91-783

No. 90-_____

IN THE

Supreme Court of the United States

October Term, 1991

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO and LOCAL UNION NO. 4,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Is the lower court's conclusion that the arbitrator was authorized unilaterally to expand the scope of his own authority in conflict with the decisions of other courts of appeals?

B. Where the parties to an arbitration enforcement proceeding dispute the scope of the arbitrator's authority to decide an issue, may the district court resolve the conflict on a motion for summary judgment simply by rejecting one party's affidavits?

C. May a district court reviewing an arbitration award reject an arbitrator's express findings of fact and substitute its own findings to support the arbitration result?

RULE 29.1 STATEMENT

The following are non-wholly owned subsidiaries or affiliates of Owens-Illnois, Inc.: Owens-Illinois de Puerto Rico; Owens-Illinois de Venezuela, CA; Fabrica de Vidrio Los Andes, CA; Manufacturera de Vidrios Planos, CA; Cristaleria Peldar, S.A.; Saski-Owens Glass Co., Ltd.; OI-NEG TV Products, Inc.; Middle East Glass Manufacturing Co.; Union Glass & Container Corp; Hellenic-Owens Elefsis Glass Company; Nippon Glass Kabushiki Kaisha; Cristaeria del Ecuador, S.A.; Consol Ltd., and Envases de Borosilicato, S.A. All other subsidiaries are wholly owned.

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Petitioner, Owens-Illinois, Inc., respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Third Circuit entered July 23, 1991, affirming the decision of the United States District Court for the District of New Jersey to enforce an arbitrator's award of $2.0 million against Owens-Illinois.

OPINIONS BELOW

The Court of Appeals entered a judgment affirming, without a written opinion, the district court's decision (A1). The district court rendered a written opinion, which is appended hereto (A3), denying Petitioner's motion to vacate the arbitration award and granting the cross motion of Respondents, Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO, and Local No. 4 to confirm the award. That opinion is reported unofficially at 136 LRRM 2397 (D.N.J. 1991). The underlying arbitration award was issued on July 3, 1990 and is included in the appendix at A35.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1991 (A1). A timely petition for rehearing was denied on August 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. The Sale of the Glassboro Plant

This case challenges an arbitrator's authority to make a $2 million award for the alleged breach of a collective bargaining agreement. It also concerns the authority of lower courts to substitute their own factual findings for those of the arbitrator.

On January 5, 1989, Owens-Illinois ("Company") sold its Glassboro, New Jersey plant to Anchor Hocking Corporation ("Anchor"), pursuant to an Asset Purchase Agreement entered into on November 14, 1988 (U.Ex. 3; JA361). At the time of the sale, the Company and the Glass, Molders, Pottery, Plastics and Allied Workers Union ("Union") were signatories to a collective bargaining agreement which expired on March 31, 1989, three months after the sale[1] (Joint Ex. 1; JA134).

Upon purchasing the Glassboro plant, Anchor immediately offered employment to all bargaining unit employees (U. Ex. 1; JA315). At the Union's direction, the employees accepted Anchor's offer. No bargaining unit employee suffered a loss of or interruption in work. The plant remained open and continued its regular operations (Arb. Op. at 22; A56).

Article 31 of the labor agreement required the Company to make severance payments to bargaining unit employees in the event of a permanent plant closing (Jt. Ex. 1, Article 31; JA159). Because the Glassboro facility continued full operations and no employees suffered a loss of or interruption in work, the Company did not make severance payments to Glassboro employees (Arb. Op. at 22; A56). The labor

[1] The Arbitrator's opinion is included in the Appendix. Citations to the Appendix to this petition are in the form ("A_____"). The pages in the Joint Appendix in the Court of Appeals are cited as ("JA_____"). Citations to the arbitration exhibits will be in the form: Union exhibits—"U. Ex."; Company exhibits—"Co. Ex."; and Joint exhibits—"Joint Ex."

agreement also provided special pension benefits to a discrete group of employees in the event of a permanent plant closing (Jt. Ex. 1, Article 19; JA147). The Company did not pay special pension benefits at Glassboro because there was no plant closing.[2]

The labor agreement included a successorship clause, Article 33, which stated that the agreement was binding on the parties' successors, transferees and assignees (Jt. Ex. 1, Article 33; JA160). Anchor purchased the plant with notice of the successorship provision (Union Ex. 1; JA315). Although Anchor chose not to assume the labor agreement for the remaining three months of its term, it maintained the wage rates and some of the working conditions stated in that agreement (Arb. Op. at 3; A37). Anchor increased insurance premiums, however, and discontinued some of the working conditions set forth in the labor agreement (U. Ex. 1; JA315).

The Asset Purchase Agreement, which contained the terms of the sale, did not require Anchor to hire or continue to employ Glassboro employees or to assume the labor agreement. The Asset Purchase Agreement did not, however, purport to define or to limit Anchor's obligation under the labor agreement (Union Ex. 3 §13(b); JA402).

Although the Union had advance notice of the sale, of Anchor's identity and of Anchor's intent not to assume the labor agreement, it took no action, either before or after the sale, to enforce the terms of the agreement against Anchor or to enjoin the sale pending a

[2] The Company's retirement plan for hourly employees did not terminate because of the sale. That plan continues to exist, is well funded and will pay benefits to former Glassboro employees as they become eligible to receive them (Coakley Aff. ¶¶3-5; JA112-14; Hayes Aff. ¶¶3-5; JA267-68).

determination of the parties' rights and obligations (Arb. Op. at 2-3; A36-37). Eventually, the Union voluntarily negotiated a new collective bargaining agreement with Anchor (Arb. Op. at 5; A39). The new agreement became effective April 1, 1989 (Union Ex. 2; JA322).

B. The Union's Grievance

Shortly after the sale, the Union filed a grievance contending that the Company violated the successorship clause because the Company did not require Anchor to assume the labor agreement for the remaining three months of its term (Jt. Ex. 2; JA168). The Union demanded that "all affected employees [must] be made whole for all loss incurred as a result of those changes for the duration of the bargaining agreement" (Union Ex. 7; JA448).

The Union also claimed that the sale constituted a permanent closing of the Glassboro plant and that its members were therefore entitled to severance and special pension benefits under the labor agreement. The parties submitted the grievance to arbitration.

C. The Submission to Arbitration

At the arbitration hearing, the Union offered evidence (Union Ex. 7; JA448) that Anchor's changes in fringe benefits caused a total monetary loss to all Glassboro employees of $31,365.20 for the period from January 5, 1989 to March 31, 1989 (Frechette Aff. ¶9; JA109; Grills Aff. ¶9; JA124). When this evidence was offered, Company and Union representatives discussed the remedy issue and agreed that if the Arbitrator found liability, the parties would attempt to resolve the remedy through negotiation while the Arbitrator retained jurisdiction to decide the remedy if the parties were unable to agree (Frechette Aff. ¶9; JA109; Grills Aff. ¶9; JA124).

Because of this understanding, the Company did not address the remedy issue, either at the arbitration hearing or in its post-hearing briefs. The Union also did not further address the remedy issue at the hearing. Indeed, the Union specifically requested in its post-hearing briefs that the Arbitrator "retain jurisdiction while the parties seek to resolve the remedy." (JA101-04).

D. The Arbitrator's Decision

The Arbitrator issued his opinion and award on July 3, 1990 (A35). The Arbitrator expressly determined that there was no plant closing at Glassboro because the plant and its operations remained intact and the employees did not suffer a loss of or interruption in employment (Arb. Op. at 22; A56). The Arbitrator concluded, therefore, that the Company did not violate Articles 31 or 19 of the labor agreement (Arb. Op. at 22; A56).

The Arbitrator concluded that the Company did violate the Article 33 successorship clause (Arb. Op. at 12-13; A47-48). According to the Arbitrator, Article 33 imposed an affirmative duty upon the Company to require any purchaser to accept the labor agreement (Arb. Op. at 12-13; A47-48). The Arbitrator made this finding despite the fact that the only bargaining history on this clause showed that the Company had rejected language proposed by the Union which would have imposed liability on the Company for "failure to require assumption of the terms of this agreement." (Co. Ex. 1; JA183).

Having found a violation of Article 33, the Arbitrator proceeded to fashion and impose a remedy. He did so despite his express recognition that neither

party had yet addressed the issue (Arb. Op. at 18; A52), and despite the fact that the parties had not yet submitted the remedy to him for decision.

Despite his unequivocal finding that there was no permanent plant closing and despite the undisputed fact that no employees lost their jobs, suffered wage rate cuts, or forfeited any vested benefits, the Arbitrator ordered the Company to pay approximately $2.0 million in severance and special pension benefits to Glassboro employees. The Arbitrator also ignored the fact that the Union's demand for relief was limited to $31,365.20, the losses its members allegedly incurred during the remaining three months of the labor agreement (U. Ex. 7; JA448).

The Arbitrator's premature and unauthorized disposition of the remedy issue deprived the Company of the opportunity to negotiate with the Union. It also deprived the Company of the opportunity to present evidence and argument on what remedy was appropriate for a violation of Article 33.[4]

E. The District Court's Decision

On August 9, 1990, the Union commenced an action in the district court to enforce the $2 million arbitration award. The Company commenced an action on August 21, 1990 seeking to vacate the award. The district court consolidated the actions.

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[3] The Arbitrator justified his remedy by stating that the parties had not suggested anything different. Because the Union never proposed the "Article 31 rectification route" as a remedy under Article 33, and indeed, did not even address the remedy issue in its post-hearing briefs, the Company had neither reason nor opportunity to oppose the remedy unilaterally created by the Arbitrator.

[4] The Company was never able to address whether the Union failed to mitigate damages, an important issue because the Union had advance knowledge of the sale and failed to make any effort to encourage Anchor to assume the labor agreement, or enjoin the sale.

The parties filed cross-motions for summary judgment. The Union sought to enforce the award. The Company sought to vacate the award or, alternatively, to limit the remedy to $31,365.20, or to remand the case for a redetermination of the remedy. On February 4, 1991, the district court granted the Union's motion and denied the Company's motion.

Although the affidavits submitted by the parties raised a disputed issue of fact regarding the scope of the submission to the Arbitrator,[5] the court declined to conduct an evidentiary hearing or to remand the case to the arbitrator for resolution. Instead the court either resolved the factual dispute and concluded that the remedy issue was submitted, or concluded that the dispute was not material because the Arbitrator was authorized unilaterally to expand the scope of the issue submitted (Dist. Ct. Op. at 28; A29).

The district court implicitly recognized that the Arbitrator could not appropriately award severance pay or special pension benefits under the labor agreement because he unequivocally determined that there was not a permanent plant closing. In an effort to correct the defect in the Arbitrator's decision, the court rejected the Arbitrator's finding of fact and made a contrary factual determination that "there was a 'plant closing' within the contemplation of the parties." (Dist. Ct. Op. at 25; A26). The court then concluded that severance pay was an appropriate remedy under Article 31. *Id.*

[5] The affidavits of John Frechette, the Company's Vice President of Labor Relations, and Arthur Grills, the Company's Manager of Group Insurance, state in their affidavits that on the first day of the arbitration hearing, the Company and Union agreed that if the arbitrator found liability, the parties themselves would attempt to resolve the remedy while the arbitrator retained jurisdiction to decide the issue if the parties were unable to agree (Frechette Aff. ¶9; JA109; Grills Aff. ¶9; JA124; Hayes Aff. ¶6; JA118).

After making its own finding that Glassboro was permanently closed, the court dismissed the Company's argument that the Arbitrator exceeded his authority in awarding $2.0 million in severance payments to employees who claimed they had only suffered $31,365.20 in actual damages. The court stated:

> Owens' argument is completely undermined when the severance payments are viewed as having been awarded by its own terms in accordance within Article 31, rather than as an approximation of damages for the breach of Article 33.

(Dist. Ct. Op. at 30; A31).

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Conclusion That Arbitrators Are Authorized Unilaterally To Expand The Scope Of Their Authority Conflicts With Decisions Of Other United States Courts Of Appeals.

Arbitrators have broad power to fashion remedies on issues that the parties have empowered them to resolve. Arbitrators do not, however, have authority to decide issues that the parties have not agreed to submit to them. *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960). Whether an arbitrator exceeds the scope of the submission is an issue that the courts must decide. *International Association of Machinists v. Texas Steel Co.*, 639 F.2d 279 (8th Cir. 1981).

The district court had evidence before it that the parties had neither completed the arbitration proceeding nor submitted the issue of remedy to the Arbitrator. The court concluded, however, that because there was no evidence before it that the parties notified the Arbitrator of their agreement to defer the remedy, the Arbitrator properly took it upon himself to fashion a remedy.

An Arbitrator can not unilaterally enlarge the scope of his authority. The district court's decision to enforce a remedy that the Arbitrator had no authority to make is contrary to decisions rendered by other United States Courts of Appeals. *See, e.g., Courier-Citizen v. Boston Electrotypers Union*, 702 F.2d 273 (1st Cir. 1983) (courts cannot enforce awards exceeding the authority conferred in the submission); *Piggly-Wiggly Operators Warehouse Inc. v. Piggly-Wiggly Operators Warehouse Independent Truckdrivers Union*, 611 F.2d 580, 584 (5th Cir. 1980) (arbitrator can bind parties only on issues they have

agreed to submit to him); *Retail Store Employees Union Local 782 v. Sav-On Groceries*, 508 F.2d 500, 503 (10th Cir. 1975) (arbitrator is restricted to deciding only issues submitted to him); *Textile Workers Union v. American Thread Co.*, 291 F.2d 894, 897 (4th Cir. 1961) (arbitration award is unenforceable if it exceeds scope of the submission); *See also Trailways Lines Inc. v. Trailways Inc. Joint Council*, 807 F.2d 1416, 1420 (8th Cir. 1986) (arbitrator exceeded authority by awarding a remedy that was not warranted by the terms of this submission); *International Association of Machinists v. Texas Steel Co.*, 639 F.2d 279 (8th Cir. 1981) (arbitrator can bind parties only on issues that they have agreed to submit to arbitration).

By reviewing this case the Supreme Court can resolve this conflict and restore uniformity among the circuits. The Court can also definitively establish that an arbitrator's authority is derived from, and limited by, the agreement of the parties.

II. This Court's Supervision Is Necessary To Prevent District Courts And Courts Of Appeals From Resolving Disputed Issues Of Material Fact At The Summary Judgment Stage Of Proceedings To Enforce Arbitration Awards.

The Company presented evidence in the district court demonstrating that it did not agree to submit the remedy issue to the Arbitrator. The evidence showed that the remedy was deferred until after the arbitrator rendered a decision on liability, and the parties had attempted to resolve the remedy through negotiation.

The Union did not dispute that the parties agreed to resolve the remedy through negotiation. It claimed, however, that it only intended to negotiate about the calculation of damages for individual employees and that it did not intend to deprive the Arbitrator of jurisdiction to decide the remedy issue.

The affidavits submitted by the Company and Union created a disputed issue of material fact regarding whether the parties deferred the remedy issue or submitted it to the Arbitrator. If the district court's decision was based upon its conclusion that the remedy issue *was* submitted to the Arbitrator, the court exceeded its own authority by resolving the factual dispute.[7]

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[7] The apparent dispute could have been viewed as not "material" only if it was resolved in the Company's favor, because unless *both* parties authorized the Arbitrator to address the remedy issue, he was without power to resolve it. *See Courier-Citizen v. Boston Electrotypers Union*, 702 F.2d 273 (1st Cir. 1983); *Totem Marine Tug & Barge v. North American Towing*, 607 F.2d 649 (5th Cir. 1979). Even if the Union's affidavits are taken as true, therefore, the court could have reached only one conclusion in light of the Company's affidavits, *i.e.*, that because *both* parties had not agreed to submit the remedy issue to the Arbitrator, it had not been submitted.

Summary Judgment is proper only where it appears from the record "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether the facts are disputed, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn to his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Both the district court and the Court of Appeals ignored these basic principles by implicitly concluding, in the face of evidence to the contrary, that the parties agreed to submit the remedy issue to the arbitrator. Such disregard of established rules of procedure requires this Court's intervention.

III. By Substituting Their Findings Of Fact For The Arbitrator's, The District Court And Court Of Appeals Exceeded The Scope Of Their Authority To Review The Arbitration Award.

The Arbitrator made an explicit and unequivocal finding that the Glassboro Plant was *not* permanently closed within the meaning of Article 31 of the labor agreement. The district court implicitly recognized that severance pay could not be awarded under the labor agreement unless the plant was permanently closed. The district court held, however, that the Arbitrator's award of severance pay was proper because, in the court's opinion, there *was* a permanent plant closing (Dist. Ct. Op. at 24-26; A26-27).

The district court had no authority to change the Arbitrator's factual findings. Indeed, this Court has recently noted that a court may not reject an arbitrator's findings "simply because it disagrees with them." *United Paperworkers International Union v. Misco Inc.*, 484 U.S. 29 (1987). To preserve the arbitral process, this Court must be quick to exercise its supervisory powers to curb the unfettered modification of factual findings made by arbitrators.

CONCLUSION

Although the scope of judicial review of arbitration decisions is limited, the integrity and continued viability of the arbitral process require judicial supervision where an arbitrator exceeds the authority granted by the parties. So too, do the lower courts require supervision when they disregard established rules of law and procedure in deference to an arbitrator's award.

In enforcing the arbitration award, the district court improperly resolved a disputed issue of fact regarding the scope of the Arbitrator's authority to reach the remedy issue. By reversing a critical factual finding of the arbitrator and making its own factual findings, the court also violated the rule that a court may not reject an arbitrator's findings of fact "simply because it disagrees with them."

Uniform, clearly stated rules of judicial review will encourage the use of arbitration. This Court's intervention is necessary to prevent the lower courts from abdicating their duty to ensure that arbitration awards draw their essence from the parties' agreement.

Respectfully submitted,

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